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CONFERENCE ON HUMAN RIGHTS, PUBLIC FINANCE, AND THE DEVELOPMENT PROCESS

HELD AT THE WASHINGTON COLLEGE OF LAW,
THE AMERICAN UNIVERSITY, WASHINGTON, D.C.

January 1992

HUMAN RIGHTS, PUBLIC FINANCE AND THE DEVELOPMENT PROCESS: A CRITICAL INTRODUCTION

Daniel D. Bradlow*

"[D]evelopment is a comprehensive economic, social, cultural, and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development."¹

Theorists and practitioners of sustainable development all agree that development is a comprehensive process that incorporates economic growth, as well as environmental, and human rights² considerations.

* Associate Professor of Law, Washington College of Law, The American University. The author thanks Joe Eldridge, of the Lawyers Committee for Human Rights, Dana Martin, of the Inter-American Development Bank, Professors Claudio Grossman and Robert Goldman, and Theresa McGhie who collaborated with him in organizing this conference.

1. *United Nations Declaration on the Right to Development*, pmbl., G.A. Res. 128, U.N. GAOR, 41st Sess., U.N. Doc. A/Res/41/128 (1987). This preamble was adopted by a vote of 146 to 1, with eight abstentions.

2. For the purpose of this paper, human rights include all civil, political, economic, social, and cultural rights. This usage is intended to differentiate human rights from environmental and other developmental issues. It should not be interpreted as questioning the existence of such rights as the right to development or the right to a clean environment.

Disagreements arise in determining the relative importance attached to these considerations. Some argue that poor countries need to concentrate on economic growth, even at the temporary expense of the environment, and of the rights of such vulnerable groups as rural workers, women, children, and indigenous peoples. They cite the examples of Korea and Chile as proof that this strategy works. Others, citing the environmental damage suffered by these countries, argue that growth based on the exploitation of the environment is too costly and ultimately is unsustainable.³

An overemphasis on growth is also criticized by those who maintain that sustainable development must produce a better quality of life for all and a society in which all members can live freely. These observers cite Costa Rica as an example of the importance of equity and social justice in producing sustainable development.⁴ They also point to the Soviet Union and Eastern Europe as examples of development strategies that have faltered because of a failure to adequately promote the free participation of all members of society.⁵

These debates suggest there is no "natural" policy sequence that decision makers⁶ in countries which face significant social, economic, and environmental problems must follow to produce a sustainable development process. Their strategy for achieving such a development process, like the goals of the process itself, is a matter of political choice; that is only partially determined by the numerous economic, human, and environmental constraints within which development must occur. In fact, their policy choices and the sequence in which they are implemented are likely to be influenced as much by the time period used in their policy analysis and the choices of their constituents, as by the priorities suggested and the constraints highlighted by the available empirical data.⁷

3. See generally DALY & COBB, *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1989); WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

4. See generally PREALC, *MEETING THE SOCIAL DEBT* (1988).

5. See DAVID C. KORTEN, *GETTING TO THE 21ST CENTURY: VOLUNTARY ACTION AND THE GLOBAL AGENDA* 156-57 (1990) (discussing the failure of the former Soviet Bloc states to practice popular participation as a key element in causing their collapse).

6. The relevant policymakers include the government in the country as well as official aid agencies and nongovernmental organizations that are active in the country.

7. For example, today Chile's adjustment and development policies are viewed as great successes. In the early 1980s, the Chilean liberalization experiment was viewed as a failure. See generally SEBASTIAN EDWARDS, *MONETARISM AND LIBERALISM: THE CHILEAN EXPERIMENT* (1987). Other examples of changing perceptions of successful sustainable development are Cuba, Brazil, Algeria, and Sri Lanka.

The inherently political nature of the development process makes it difficult to integrate human rights, economic development, and environmental concerns into an overall development strategy that is applicable to all societies. Many governmental and non-governmental organizations rely on specialized mandates to avoid addressing all the complex interrelationships between their specific area of expertise and other aspects of the development process. For example, the international financial institutions, such as the World Bank, have historically justified their failure to consider human rights conditions in borrower countries or the human rights impact of their operations by arguing that their mandate, as expressed in their Articles of Agreement, is limited to economic development and specifically excludes such "political" concerns.⁸ Similarly, many human rights organizations have concentrated on civil and political rights which are easily monitored and for which there are relatively clear mechanisms for seeking redress. These groups argue that civil and political rights can be enforced without reference to economic and environmental issues.⁹

This specialization has contributed to the successes that development and human rights groups have achieved. It has also allowed non-indigenous organizations to advance their particular interests without necessarily paying full attention to the effect their actions may have on how target governments allocate resources and make development policy. While these organizations are using their influence to advance important aspects of human and social life, they may also be diverting government resources from equally valid uses. For example, the activities of non-indigenous human rights groups may lead to increased expenditures on and improvements in the administration of justice, but at the

8. See generally IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 53-135 (1992). Also see Ibrahim F.I. Shihata, *Human Rights, Development and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 31 (1992).

9. There are many, both within and outside the human rights community, who disagree with the distinction between civil and political rights and the economic context within which they operate. See Reginald H. Green, *Participatory Pluralism and Pervasive Poverty: Some Reflections*, THIRD WORLD LEGAL STUDIES - 1989 21, 24-30 (1989) (discussing the role of poverty in participatory politics and the ineffective distinction between human rights and economic growth); Jack Donnelly, *Human Rights and Western Liberalism*, in HUMAN RIGHTS IN AFRICA 49-52 (Abdullahi Ahmed An-Na'im and Francis M. Deng eds., 1990) (discussing the connection between civil and political rights and economic well-being); Julius O. Ihanvbere, *Underdevelopment and Human Rights Violations*, in EMERGING HUMAN RIGHTS 55-57 (George W. Shepard, Jr. and Mark O.C. Anikpo eds., 1990) (discussing the relationship between economic development and human rights).

expense of resources allocated for health, education, and job creation strategies.¹⁰

The non-indigenous environmental movement has been more successful than human rights and development groups in integrating environmental concerns with economic development. The movement's attention to the impact of economic development on indigenous peoples and other vulnerable groups highlights the linkage between economic development, environment, and human rights.¹¹ However, environmental organizations have yet to incorporate the full panoply of human rights concerns into their analyses and activities.

The social and economic transformations that many countries began in the 1980s, the fragile and potentially dangerous condition of our environment, and the significant political and economic challenges facing industrialized countries demonstrate that strict operational separation between the economic, environmental and human rights aspects of development is no longer possible.¹² The tragic difficulties that people in many countries are presently experiencing suggests an urgent need to systematically explore the relationships between these three facets of development.

It was with the goal of promoting this examination that the International Legal Studies Department of the Washington College of Law, The American University, the Lawyers Committee for Human Rights, the International Human Rights Law Group, and the Subcommittee on Regional Development Banks of the Committee on International Investment and Development of the American Bar Association organized a conference on "Human Rights, Public Finance and the Development Process."¹³ The conference had two specific objectives. The first was to explore the concept of popular participation and its role in a develop-

10. See Green, *supra* note 9, at 30 (discussing the resource trade-off between preserving human rights and enhancing economic well-being).

11. See JOHN CLARK, *DEMOCRATIZING DEVELOPMENT* 150-51 (discussing the linkage between economic development, human rights, and the environment); *id.* at 117-18 (discussing a Bangladeshi dam project which proceeded while ignoring the environmental impact of the dam). See generally MIKESELL & WILLIAMS, *INTERNATIONAL BANKS AND THE ENVIRONMENT: FROM GROWTH TO SUSTAINABILITY, AN UNFINISHED AGENDA* (1992) (discussing the impact of investment on the environment).

12. See generally GIOVANNI ANDREA CORNIA ET AL., *ADJUSTMENT WITH A HUMAN FACE* (1987) (discussing the inter-relationship between economic development and human rights).

13. The conference took place on January 24, 1992, at the Washington College of Law of The American University. The conference was supported by a grant from the Ford Foundation and a donation from the Women's Division, Global Ministries, United Methodist Church. The conference was perceived to be the first step in an ongoing process of promoting the incorporation of human rights considerations into the development process and into public development financing.

ment process that promotes human rights, economic development, and environmental protection. The second objective was to explore the extent to which the World Bank, the most important provider of international development finance and policy advice, could incorporate this aspect of sustainable development into its policies and funding operations.

The opening address, by Professor Edith Brown Weiss, of the Georgetown University Law Center, provides an overview of the relationship between the environment, economic development, and human rights. In the keynote address, Dr. Ibrahim Shihata, Vice President and General Counsel to the World Bank, discussed the ability of the World Bank to incorporate human rights into its policies and operations. Papers entitled "Development Finance and Public Accountability"¹⁴ and "Monitoring Human Rights Aspects of Sustainable Development"¹⁵ were presented. Each paper is followed by commentary from two panel discussants.

The Role of Participation

The role of popular participation in sustainable development is discussed in the opening address by Professor Edith Brown Weiss, and in the panel discussions on "Participation and Development," and "Monitoring Human Rights Aspects of Sustainable Development." The speakers and discussants in these sessions seek to answer one or more of the following questions:

(a) Is popular participation an essential element of sustainable development?

(b) If so, do human rights, environment, and economic development organizations and practitioners share a common definition of popular participation?

(c) How do we implement this common concern?

Professor Brown Weiss suggests that concern for the environment pushes environmentalists to consider intergenerational rights and obligations. These rights and obligations relate to the conservation of the world's natural resources and biological diversity, preservation of the quality of the world's environment, and ensuring that present and future generations have an equal opportunity to experience and use the

14. The paper for this presentation was presented by Jerome Levinson, and the discussants were Nancy Alexander and Bruce Rich.

15. The paper for this presentation was presented by Dr. Katarina Tomaševski, and the discussants were Barbara Bramble and Dr. Peter Sollis.

world's resources.¹⁶ She further suggests that respect for these intergenerational rights implies concern for intragenerational equity. This is because the present generation can meet its obligations to future generations only if all members of the present generation have equitable access to the economic and environmental legacy that it received from past generations. History demonstrates that in the absence of equitable access, both the rich and poor abuse our environmental legacy.¹⁷

The principles of intergenerational equity also require economic development planners to be as concerned with project maintenance as they are with creating new capital investments.¹⁸ This is because the rights of future generations to conservation of options, quality, and access are unlikely to be respected if development planners are more concerned with the creation of new assets than with how they will be used. In addition, projects are unlikely to be maintained if the intended beneficiaries have neither the technical capacity to preserve the project assets, nor the sense that they have a stake in maintaining the project. This suggests that development planners cannot adequately perform their economic and environmental responsibilities without incorporating into their project designs mechanisms that allow project beneficiaries the opportunity to participate in project-related activities.

The importance of participation is also stressed by other participants. Katarina Tomaševski of the Danish Center for Human Rights, suggests that the opportunity to influence developmental policies and projects is an important protection for victims of "development abuses."¹⁹ Barbara Bramble, Director of International Programs at the National Wildlife Foundation, emphasizes that the environmental movement has learned

16. Brown Weiss calls these intergenerational rights the principles of conservation of options, conservation of quality, and conservation of access. See Edith Brown Weiss, *In Fairness to Future Generations*, 8 AM. U.J. INT'L L. & POL'Y 19, 22-23 (1992).

17. See KORTEN, *supra* note 5, at 3, 14, 42-43 (discussing the impact of vast numbers of poverty-stricken individuals on a strained environment and the waste inherent in satisfying the luxuries of the affluent).

18. Brown Weiss indicates that this represents an important shift in focus for project analysis. It means that the analysis must focus less on present values, which substantially discount the future, and more on a consideration of both present and future costs and benefits. This refocused analysis should more accurately reflect the lifetime costs and benefits of a project. See Weiss, *supra* note 16, at 28.

19. The best known victims of development are indigenous peoples, women, workers whose wages have been suppressed to promote export-led growth, and the rural poor who have been deprived of their land and all ability to control their lives. See SARDAR SAROVAR, *THE REPORT OF THE INDEPENDENT REVIEW* (1992); CHERYL PAYER, *THE WORLD BANK: A CRITICAL ANALYSIS* 53-86 (1982) (discussing the effects of development on vulnerable segments of the population); Jerome Levinson, *Multilateral Financing Institutions; What From of Accountability* 8 AM. U.J. INT'L L. & POL'Y 43, 45 (1992).

that popular participation in decision-making regarding resource allocation and management can mitigate the adverse environmental impact of economic development. She noted that effective participation implies a public right of access to the information necessary to make informed decisions.²⁰ Environmental groups are beginning to incorporate this issue into their campaigns for more environmentally responsible economic development.

These presentations indicate that the ability of people to participate in social decisions that affect their lives is an essential element of sustainable development. In its absence, policymakers cannot be confident that their policies meet the needs of their communities, or that those injured by their actions have had an opportunity to mitigate their losses.

The importance of popular participation to sustainable development also suggests that development is not simply about formulating policies and designing projects for the benefit of a target group of people. Instead, it is a process in which the beneficiaries help formulate and implement the policies and programs that they believe will improve the quality of their own lives.²¹

The recognition of the centrality of popular participation in the development process poses a challenge to economic development, human rights, and environmental organizations which, because of their concentration on specific aspects of development, are all seeking to impose some aspects of their definition of "good" development on their target population groups. It challenges those concerned with economic development to attach greater significance to people than to projects. It also requires environmentalists to acknowledge that they cannot place a higher priority on the long-term preservation of the natural environment than they do on human beings and that they must combine protection of the environment with helping people meet their immediate material needs.²² Finally, it requires human rights organizations to acknowledge that the civil, political and human rights they seek to protect cannot be addressed outside the economic, social, cultural, and environmental contexts in which they operate. Given that development is

20. Bramble cites the comment and review process established by the National Environmental Protection Act as an example of a procedure that meets this standard. Barbara Bramble, *Response to Katarina Tomaševski*, 8 AM. U.J. INT'L L. & POL'Y 107, 108-109 (1992).

21. See CLARK, *supra* note 11, at 89-90 (discussing the emergence of grass-roots movements); KORTEN, *supra* note 5, at 156-59 (discussing the costs of failing to include popular participation in development planning).

22. See generally, EDWARD B. BARBIER ET AL., *ELEPHANTS, ECONOMICS AND IVORY* (1990) (discussing the economic impact of the ban on the ivory trade).

a social process, recognition of the importance of popular participation also suggests that human rights groups need to add questions of inter-group rights to their traditional concern with the rights of the individual.²³

The centrality of popular participation to development poses the further question of whether popular participation should be seen as a means to achieving development or as a goal of development. This issue, while not expressly addressed at the conference, is implicit in much of the discussion about defining and operationalizing popular participation.

The Definition of Participation

Various conference speakers discussed the definition of participation. These discussions are instructive in that they reveal how imprecise the concept of participation is and what little agreement there is on its definition. Paula Donnelly-Roark, a consultant with the United Nations Development Program, makes the most systematic effort to define participation. She identifies three forms of participation distinguishable according to when, in the progression from problem identification to solution implementation, participation first occurs. The first, which she calls mobilization, occurs when agents who are not members of the beneficiary community identify a problem, design a solution to it, and organize the community to implement that solution. In this form of participation, the outside agents control all the key decisions but the community is able to participate in the implementation of the outsider's strategy. She suggests that family planning is organized around this model of participation.

The second form, community or institutional development, occurs when experts from outside the community identify a problem and then work with the community to develop a solution. In this model the community participates in the design and implementation of development projects and programs. Donnelly-Roark points to water and agricultural extension projects as examples of this method of development.

23. Tom Farer, *The Hierarchy of Human Rights*, 8 AM. U.J. INT'L L. & POL'Y 119, 121-22 (1992). This is not to suggest that human rights groups should abandon their traditional concerns. The cases of Wangari Muta Maathai and Chico Mendes, for example, demonstrate the importance of traditional human rights activities. See Andrew Revkin, *Chico Mendes: The Man Who Tried To Save the Amazon Rain Forest*, L.A. TIMES, June 17, 1990, at M2 (discussing the importance of Chico Mendes's fight to save the rain forests of Brazil); Mary Ann French, *The Woman & Mother Earth: Kenya's Wangari Maathai, Linking Lives to the Planet*, WASH. POST, June 2, 1992, at D1 (chronicling the life of Wangari Muta Maathai).

In the third model, empowerment, the community participates in identifying development problems, in establishing development priorities, and in designing and implementing solutions to these problems. In this model the community may control all aspects of the development process. Outsiders act primarily as providers of technical services.

In summation, Donnelly-Roark argues that empowerment is the only true form of popular participation because it allows people to be the active creators of their own future rather than merely the selectors of options created by others.

Tom Farer, of the Washington College of Law, criticizes Donnelly-Roark's definition as being ambiguous. His critique notes that Donnelly-Roark's definition describes the form but not the content of participation. He explains that empowerment could mean either the right to be heard or the right to veto project decisions. The former would only involve the participants' right to express their views on the project planning, implementation, and management process. The latter would enable participants to both determine which development projects are undertaken and how they are structured and managed. While the latter is the more comprehensive form of popular participation, both are consistent with Donnelly-Roark's definition of empowerment and the role she assigns to outsiders.

Although not discussed at the conference, Donnelly-Roark's classification can also be criticized as being too static. It does not reflect how the interaction between participation and other essential elements of sustainable development, like efficiency, may evolve over the life of a development project or program. Since the process is dynamic, the appropriate balance between these potentially competing demands can be expected to change to meet the differing needs of the design, implementation, and management phases of the development process. A complete definition of participation should incorporate this possibility.

Tomaševski gives a useful illustration of how the failure to integrate efficiency and participation can reduce participation to a formalistic exercise of limited developmental significance. She argues that the performance of international organizations, which are charged with funding participatory development, is often measured by the number of fundable projects they produce each year.²⁴ In these circumstances, international bureaucrats are more likely to be rewarded for making an effort to "hear" the views of project beneficiaries and then reporting them in a way that supports proposed projects, than for taking the time

24. On the issue of only using quantitative measures of development, see Nancy Alexander, *Response To Jerome Levinson* 8 AM. U. J. INT'L L. & POL'Y 69 (1992).

to "listen" to these views and then adopting adequately responsive projects and programs. The latter, however, is time-consuming, unpredictable, and may result in activities that do not conform to the priorities of the international organization or its member states.

Farer also criticized Donnelly-Roark's classification as only being applicable to community-level development activity. He asserts that at a national or even regional level the question of participation is more complex. The increased number of participants and the broader range of issues inevitably results in less direct forms of participation. At this level, the most relevant issues are not project specific but concern broader policy issues such as the selection of leaders, the ability to hold them accountable, and the creation and maintenance of mechanisms through which people can effectively communicate with their leaders. These mechanisms may include such devices as notice and comment periods before government actions take effect, the use of ombudsmen, and devices for ensuring free access to information. Participation at the national and regional levels also involves the development of a vibrant civil society.

The problem of defining participation at the international level is even more complex. Traditionally, participation in international organizations has been reserved for sovereign states. In recent years as the power of international organizations—particularly the international financial institutions such as the World Bank—has increased, the need for non-governmental actors to have their own channels of communication to decision makers in these organizations and the means to hold them accountable has become more urgent. While some such mechanisms exist,²⁵ they are relatively ineffective in that they do not usually provide for direct non-governmental participation in the making and implementation of the policies of these organizations.²⁶

The conference discussions demonstrate that, because of the many different contexts in which participation must operate, agreement on a single definition of participation may not be achievable. It also may not be possible to reach such agreement until the issue of whether participation is a means or an end of development is resolved. This suggests that it may be more productive for people interested in promoting sus-

25. The World Bank has an NGO liaison committee. See SHIHATA, *supra* note 8, at 92 n.106 (noting cooperative action between the World Bank and NGOs). The United Nations also has procedures for ensuring that NGOs have standing and the ability to participate in at least certain aspects of their work. *Id.*

26. See SHIHATA, *supra* note 8, at 144-45 (stating that the role of NGOs in determining World Bank policy is merely advisory).

tainable development to concentrate on operationalizing participation than on developing a single definition of participation.

Operationalizing Participation

Operationalizing participation, in this context, means translating this essential element of development into universally applicable standards that can be used to test the degree of participation in any development policy or project. Identifying "acceptable" participation is difficult because there is neither a universally accepted definition of participation, nor an agreement on its function in development. However, there is sufficient understanding of participation that human rights, economic, and environmental experts can all agree on the characteristics of situations in which there is an absence of meaningful participation. This knowledge is primarily derived from the experience of human rights groups in dealing with suppression of participation and from the experience of environmental groups in dealing with the environmental and social consequences of inadequate participation.²⁷ It indicates that, at a minimum, participation should provide people with an opportunity to communicate their opinions on the developmental policies affecting them to the relevant decisionmakers.

This suggests that the first step in promoting participation is to formulate minimum standards that focus on procedural rather than substantive issues. Such standards would serve as a reference to test whether people had an opportunity to express their opinions regarding the design, implementation, and management of development policy. They would also test how policymakers incorporated these views into their deliberations. If a country's policies or development projects can meet these minimum procedural standards, we may assume that either the substantive outcome is acceptable to the interested communities, or that the interested communities will use the available procedures to change the outcome.

The lessons learned from these experiences could enable us to slowly develop universally acceptable and monitorable standards for measuring sustainable development performance and to determine whether participation should be treated as a means to or as a goal of development.

27. Both Brown Weiss and Sollis suggest that our ability to promptly identify projects and policies that fail to respect these minimum standards is facilitated by the information revolution. Brown Weiss also stresses the significance of this revolution to environment, human rights, and development. Weiss, *supra* note 16, at 28; Peter Sollis, *Response to Katarina Tomasevski*, 8 AM. U.J. INT'L L. & POL'Y 113, 114 (1992).

This emphasis on procedural standards indicates that the existence of such rights as freedom of speech, freedom of association, the right to vote, and the right to petition for redress are necessary but insufficient components of participation. The critical issue is the actual exercise of these rights. This focus on actual practice will ensure that all members of society and all social groups, particularly poor and vulnerable persons, participate in the development process. This focus also highlights the significance of the context within which these rights are exercised and precludes treating these rights separately from the educational, cultural, environmental, and economic factors that affect the ability of people to exercise these rights. Finally, this focus demonstrates the importance of people having access to sufficient information from both domestic and international sources to make informed decisions.

The recognition that the minimum procedural standards incorporate political and economic considerations underscores the significance of the concern expressed by Jerome Levinson, former General Counsel to the Inter-American Development Bank, that too many development planners place inadequate emphasis on the "social question" in their measurement of development.²⁸ He argues that if issues of poverty and social justice are factored into the measurement of country performance, the track record of such development "stars" as Chile and Korea, which have utilized substantial labor repression in their development strategies, would appear less impressive in comparison with other countries, like Costa Rica, that experienced less spectacular economic growth but enjoy improvements in health, education, and other welfare issues. The latter would also be more likely to perform well on the minimum procedural standard being proposed herein.

A related point is raised by Nancy Alexander of Bread for the World, who argues that the international development agencies place too much emphasis on quantitative measurements in their assessment of development performance. She suggests that more importance should be attached to qualitative criteria. The minimum procedural standard is a qualitative test and so might meet some of the concerns raised by Alexander.

It should be noted that the minimum procedural standards are also applicable to human rights, economic development, and environmental organizations. The performance of these organizations, both in terms of their development policies and operations and their institutional structures can also be tested for compliance with the minimum procedural standards. Such testing necessarily involves consideration of their rela-

28. Levinson, *supra* note 19, at 64-67.

tionships with their "clients" and the extent to which these clients observe the minimum standards in their own development policies and programs.

The Performance of the World Bank

Evaluating the performance of the World Bank in terms of participation was the second theme of the conference. The recognition that participation, which necessarily involves the exercise of certain human rights, is an essential element of development poses a particular challenge for international development financing agencies like the World Bank. The charters of all the multilateral development banks, with the exception of the European Bank for Reconstruction and Development, expressly prohibit the banks from considering the "political character" of their borrowers in their lending operations and strategies.²⁹

The multilateral banks have argued that this prohibition precludes them from incorporating human rights issues into their decision making process. However, the banks have been creative in interpreting their Articles of Agreement. The World Bank, for example, has not interpreted the prohibition on political interference as precluding its involvement in issues of governance, which its legal counsel, Dr. Shihata, defines as good order:

in the sense of having a system based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules. This system of rules and institutions is reflected in the concept of 'the rule of law. . . .'³⁰

Shihata and Levinson both discuss the scope of permissible human rights issues that the banks may consider as well as the nature of their obligation to their various stakeholders.³¹ Dr. Shihata asserts that the World Bank interprets its Articles of Agreement as broadly as possible

29. Compare INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT, art. III(5) and art. IV(10), T.I.A.S. No. 1507, 2 U.N.T.S. 134; AFRICAN DEVELOPMENT BANK ARTICLES OF AGREEMENT, art. 38, 510 U.N.T.S. 3; ASIAN DEVELOPMENT BANK ARTICLES OF AGREEMENT, art. 36, 571 U.N.T.S. 123; EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT, preamble, art. I, 29 I.L.M. 1077 (1990) (failing to limit political considerations in European Bank for Reconstruction and Development loan decisions); INTER-AMERICAN DEVELOPMENT BANK ARTICLES OF AGREEMENT, art. VIII(5)(f), 389 U.N.T.S. 69.

30. SHIHATA, *supra* note 8, at 85. Shihata concedes that governance can have broader definitions, but argues that this definition helps allow the World Bank to identify those governance issues that fall within its mandate. He does not explain how such human rights as freedom of speech, freedom of association, the right to a fair trial, and the application of law to non-economic activity can be distinguished from those aspects of "rule of law" that falls within the scope of the Bank's Articles.

31. SHIHATA, *supra* note 8 at 84-93.

so that it may incorporate as many different aspects of development as possible into its policies and operations. He argues that in their present form, the Bank's Articles allow the Bank to address economic and social rights but are not sufficiently elastic to address all the civil and political rights relevant to participation. Dr. Shihata does not oppose amending the charter to include all human rights but observes that the world benefits from international organizations with limited mandates. A limited mandate allows limited international cooperation to proceed despite important areas of disagreement. Such limitations allow the World Bank to develop expertise in economic development while other international organizations develop their expertise in human rights or other aspects of human existence.

Dr. Shihata's defense of the World Bank's position on human rights raises an important issue. Because of the size of funding operations, the catalytic effect of their funding decisions and the scope of the conditions attached to this funding, multilateral banks are able to exert considerable power over their borrowers. This power would increase substantially if the banks were required to take all human rights issues into account in their policies and operations. Such an increase in the Bank's power could be problematic because of the Bank's weighted system of voting and the lack of international consensus on the interaction between human rights and other aspects of the development process. The incorporation of human rights into the Banks' mandate could, therefore, result in the implementation of one group of countries' perception of human rights regardless of its applicability in different cultural and socio-economic settings. Moreover, the World Bank does not presently have expertise in human rights issues, and it would be costly to develop such expertise.

On the other hand, the comprehensive nature of the development process means that it is impossible for the Bank to formulate policies and design projects that only affect economic development. The World Bank, therefore, cannot adequately perform its economic development function without basing its policies and lending decisions on careful consideration of all the consequences of its actions, including the social implications of its operations. This includes the possibility that its operations may exacerbate social tensions and lead to human rights abuses.³² In fact, the Bank's failure to publicly address these issues

32. While the Bank may consider these issues in its internal discussions, the Bank's failure to explicitly incorporate them into its policies and operations raises doubts about the attention the institution pays to these issues. These doubts have been strengthened by the findings of the Independent Review of the Sardar Sarovar Projects. *See supra* note 19. The Bank's differing responses to the human rights situations in Kenya,

suggests implicit support for the rich and powerful in the recipient countries. Without making specific and unambiguous efforts to incorporate the voices of the poor and powerless into its development planning,³³ the Bank is likely to hear and respond only to the voices of the rich and powerful.³⁴

It should be noted that the suggestion that the people at the bottom have a right to participate in decisions that affect them is also a challenge to the Bank's decision making structure. According to this structure, the "top"—the international development funding agencies and governments—make decisions for those at the "bottom"—the people most directly affected by these decisions. The Bank will need to develop a less hierarchical decision making structure if it is to heed the call to incorporate the voices of all stakeholders into its development planning.

The complexity and political significance of these issues suggest that any change in the Bank's mandate cannot be made without serious reflection and wide agreement amongst the Bank membership. Shihata and Levinson both suggest that an amendment to the World Bank's Articles would be the most appropriate method of broadening its mandate to include human rights. This would force the political leadership in the Bank's member countries to address these difficult issues.

Levinson also argues that it is more appropriate to require the membership to change the mandate of an international organization than to passively grant the staff of the organization the ability to reinterpret the Articles in such a fundamentally new way. This approach could also help promote political accountability in the Bank's member countries. Bruce Rich, of the Environmental Defense Fund, agrees with Levinson on this point. However, Rich questions the feasibility of this approach in the present political climate in the United States.

Malawi, the Peoples Republic of China, and Indonesia suggests that the Bank does not have a consistent policy for dealing with human rights issues. See LAWYERS COMMITTEE FOR HUMAN RIGHTS (W.R. SMITH, R. GOLDBERG, D.J. LIPPERMAN, EDs.) REPORT ON GOVERNANCE AND THE WORLD BANK (1992), (copy on file with the author).

33. It should be noted that the World Bank has made some efforts to address this issue. See SHIHATA, *supra* note 8, at 92-93 (discussing the embryonic state of popular participation in World Bank decision making). However, it has not yet explicitly recognized that it has an obligation to all its stakeholders to limit the adverse effects its own policies and operations have on existing social tensions in its borrower countries. *Id.*

34. This issue has been raised most forcefully by the environmental organizations and indigenous peoples' organizations in their critiques of specific Bank projects. See Bruce Rich, *The Emperor's New Clothes: The World Bank and Environmental Reform*, 8 WORLD POL'Y J. 305, 316-27 (1990) (discussing the tension between environmental and development concerns and focusing on the contradictory needs of the Bank's bureaucracy, the government officials in the funded country, and the population indigenous to the region near the Bank's project); Bramble *supra* note 20, at 113; Alexander, *supra* note 24, at 73.

Conference participants also discussed the application of the standards of participation to the internal policies and procedures of international development agencies like the World Bank. They agree that the public has an important and legitimate need to have access to more information on the policies and operations of the World Bank. This would promote the public's understanding of the Bank and how they can use it to promote sustainable development.

Levinson, however, draws a distinction between different categories of Bank information. He asserts that the public should have easy access to information that relates to general policy debates, such as the present debate on governance.³⁵ He cautions, however, that public access to sensitive information the Bank receives from member states should be restricted. This is because the success of the Bank's relations with these borrowers depends on their confidence in the Bank's ability to protect the confidentiality of this information. In addition, he suggests that efficient functioning of the institution depends on the staff being able to protect the confidentiality of their internal memoranda and reports. Failure to protect these documents could harm the Bank's relations with borrowers and impede the free flow of information in the organization. Other speakers recognize the international development agencies' need for some confidentiality but suggest that it is being carried to extremes. Levinson does not discuss the criteria that should be used to classify information or how they should be applied.

The problems that the international development agencies face in this regard are not dissimilar to those that all governmental agencies face. All publicly funded agencies must balance their need to collect sensitive data with the democratic imperative that the public have sufficient access to information so that they can meaningfully participate in public affairs. The Bank could therefore learn from the experience of its member states.

One possibility is the use of an ombudsman. The World Bank could create an ombudsman's office that could help resolve complaints about restrictions on the access to information. This office would report directly to the Bank's executive directors and would be assured budget-

35. A good example of the type of information that should be publicly available is the leaked memorandum of Lawrence Summers, the former Chief Economist at the World Bank suggesting that developing countries might be underpolluted and therefore have a comparative advantage in international trade in pollution. The public obviously has an interest in the Chief Economist's views on such important issues, and these views should be made publicly available through more appropriate methods than leaks. *Let Them Eat Pollution*, *ECONOMIST*, Feb. 8, 1992, at 66 (revealing the existence of the memorandum from Lawrence Summers on pollution and developing countries).

ary and operational independence. While the ombudsman would resolve issues of information access, its primary function would be to receive and investigate all complaints about ongoing Bank policies and operations. Thus, the ombudsman's office could promote participation as well as transparency in World Bank operations.

While there is general agreement among conference speakers that international organizations should be held accountable for their actions, disagreement exists over to whom they are accountable. Levinson believes that international organizations, like the World Bank, should be held accountable by their members, which are sovereign states. He argues that since member states are accountable to their people, the public could influence the international agencies through their governments.

Bruce Rich and Nancy Alexander counter that this argument both underestimates the influence that the World Bank and other international agencies exert over many of their member countries and overestimates how accountable member state governments are to their own people. They suggest that international institutions should be subjected to multiple levels of accountability. The institutions should be accountable to their member states as well as other institutional stakeholders such as the taxpayers who provided their funding and the persons and communities affected by their operations. The latter position is more consistent with the participatory nature of a sustainable development process. An ombudsman's office in the World Bank could play an important role in facilitating this accountability while balancing the need for accountability against the pressure for efficiency in Bank operations.

CONCLUSION

The conference demonstrates that although human rights, development, and environment groups all recognize the relevance of participation to sustainable development, they do not share a common understanding of this concept. In fact, there are differing views on the definition of participation both within and between these groups. There is also disagreement over whether participation is a means to development or is an end in itself. However, all groups agree that the absence of participation means the absence of mechanisms through which affected communities can express their views and concerns. This suggests that the most effective way to operationalize participation is to focus on the minimum standards that these mechanisms should satisfy. Thus the focus should be on procedural rather than substantive issues. We can

be reasonably confident that development policies and programs which evolve out of procedures that satisfy these minimum standards either reflect the needs and priorities of the interested persons and communities, or the interested persons and communities will use the available procedures to change the offending policies and programs.

The conference also indicates that the World Bank cannot easily satisfy these minimum procedural standards because they challenge the World Bank's decision-making structure and its interpretation of its mandate. Participation thus raises such issues as the need to amend the Bank's Articles, to whom the World Bank should be accountable, and how to balance the Bank's conflicting needs for confidentiality and transparency.

The last two issues are similar to the problems faced by governments and their agencies and instrumentalities in all Bank-member countries. Consequently, the Bank could learn from the experience of member states in promoting the transparency of their operations and their responsiveness to their constituents. One mechanism that the Bank could adopt is the ombudsman.

The conference was intended as a first step in a process of study, dialogue, and action. It is our hope that the publication of these papers will further stimulate this process.